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Eavesdropping and Free Expression

The brilliant service rendered by Mr. Justice Harlan's penetrating dissent in the electronic eavesdropping case decided by the Supreme Court on Monday is that it sets forth with perfect clarity the conflicting priorities involved. The choice confronted by the court in a most difficult case entailing a complex of earlier decisions was essentially a choice between liberty and safety, between the protection of privacy and the facilitation of law enforcement. The court concluded that the Fourth Amendment does not require the police to obtain a warrant or court order in advance when they record a conversation broadcast electronically by a microphone concealed on the person of an informer.

The gist of the prevailing view, set forth in an opinion by Mr. Justice White, was that the Constitution affords no protection to a defendant who talks imprudently to a person in whom he mistakenly has confidence and that the situation is not altered by the use of an electronic device to broadcast the conversation to listening police officers. There is an undoubted logic to this reasoning; and there is no doubt that it helps in catching criminals. As Justice White noted, "an electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent."

But when this has been acknowledged, there ought to be consideration also, as Justice Harlan points out, for "the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement . . . Were third party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life."

Can anyone seriously doubt, in the light of recent disclosures concerning military surveillance and FBI investigating practices, that snoopers or informers, "wired for sound" would be employed very extensively indeed to root out those expressions of political heterodoxy which officialdom might regard as "disloyal" or as a threat of some sort to national security? Justice Harlan put the proposition with great force. The interest which the court decision fails to protect, he said, "is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation."

It seems to us that imposition of a warrant requirement before listening in on conversations to which they are not a party does not impose upon the police a burden too onerous in light of the great values and interests which the warrant was designed to safeguard. A search warrant obtained in advance of such eavesdropping does not provide very much protection to citizens; it is too easily obtained from complaisant or careless judges. But it serves at least to remind the police that vital constitutional rights are involved and, perhaps, to put some restraint upon their intrusions into privacy.

The reach of the Fourth Amendment in forfending such intrusions is, of course, open to conscientious argument. We should suppose that the First Amendment would equally restrain police intrusions of this sort. For such intrusions undoubtedly have a chilling influence on the exercise of First Amendment rights. Citizens are unlikely to speak with the freedom indispensable to the democratic process if they fear that an army of snoopers may be taking down for indefinite preservation every dubious opinion, every extravagance of expression they may utter.